

¹ Although claimant's form K-WC E-3 Application for Preliminary Hearing alleges accident "on or about December 30, 1998, and continuing each day thereafter until 1/29/99", Claimant's Application for Review by Kansas Workers Compensation Appeals Board and the Appeal Brief and Case Summary of Claimant to the Workers Compensation Appeals Board only allege a single accident date of December 30, 1998.

(1) The claimant, Vina M. Miller, alleges she injured her low back while assisting a co-worker lift and move a credenza on December 30, 1998. Thereafter, she continued working for respondent but experienced an increase in her symptoms. She described having excruciating pain on or about January 19, 1999. At first she attributed this pain to her hip, but later came to understand that her pain was due to a condition in her back. Claimant also described this sudden onset of excruciating pain and shooting pain as occurring on the night she had to be taken to the hospital emergency room in Parsons, Kansas. The records in evidence from Labette County Medical Center show she was admitted on January 25, 1999.

(2) Claimant has a history of osteoporosis which resulted in a left hip replacement a few years ago. She also had low back surgery in 1995 to the same level of her back as she alleges was injured on December 30, 1998. In addition, before December 30, 1998, claimant had been experiencing ongoing back problems including burning or shooting pains in her hip and low back. She seldom had a good day and does not ever describe being completely free from pain.

(3) Claimant was treated by orthopedic surgeon William L. Dillon, M.D., who performed surgery on January 29, 1999. This procedure consisted of an L4 laminectomy, exploration of the L3-4 disc, and excision of a recurrent L4-5 disc herniation.

(4) Dr. Dillon's operative report indicated Ms. Miller had a history of congenital spondylosis and disc herniation at L4-5. His postoperative diagnosis was "congenital spondylosis recurrent disc herniation L4-5, Degenerative bulging L3-4 disc."² In a letter dated February 17, 1999, addressed to claimant's counsel, Dr. Dillon wrote:

Vina Miller was recently seen and treated for a recurrent disk herniation. The patient's pain increased suddenly after she was lifting a desk at her place of employment. The patient had known degenerative disease of her hip and had called with increasing hip pain. We thought from that conversation that the arthritis in her hip was causing her pain. Unfortunately, that was done over the phone and the patient was not examined until she came in with severe incapacitating pain. At that time her exam was obviously consistent with a herniated lumbar disk, which was confirmed on studies that were performed at that time.³

(5) Claimant admits that the first time she had any severe, excruciating or debilitating type of pain in her low back was on or about January 19, 1999.

² Respondent's Exhibit 1 to the Preliminary Hearing Transcript.

³ Claimant's Exhibit 1 to the Preliminary Hearing Transcript.

(6) The Appeals Board finds that the evidence fails to establish that Ms. Miller's surgery and/or present need for medical treatment is directly related to an accidental injury that arose out of and in the course of her employment with respondent.

Conclusions of Law

(1) The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.⁴ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁶

(2) To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."⁷ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.⁸

(3) In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an

⁴ K.S.A. 1999 Supp. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁵ K.S.A. 1999 Supp. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 1999 Supp. 44-501(g).

⁷ K.S.A. 1999 Supp. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

⁸ Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

(4) Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.⁹

(5) The phrase "arising out of" employment requires some causal connection between the injury and the employment.¹⁰

(6) An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹²

(7) Dr. Dillon's operative report appears to attribute claimant's condition to a pre-existing degenerative condition. His subsequent letter refers to a lifting incident at work, but Dr. Dillon seems to be under the impression that this incident caused her pain to increase suddenly and was the immediate precursor to the call he received from claimant in January of 1999 when she was in "severe incapacitating pain". He does not appear to understand or be aware of the fact that claimant was able to continue working for almost three weeks following the lifting incident of December 30, 1998.

(8) Considering both claimant's testimony and the medical records in evidence, the Appeals Board agrees with and affirms the ALJ's finding that Ms. Miller has failed to prove that any accident occurring at work on December 30, 1998 caused her sudden onset of pain in January which then led to the January 29, 1999 surgery.

(9) As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.¹³

⁹ Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

¹⁰ Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P. 2d 197 (1956).

¹¹ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

¹² Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

¹³ K.S.A. 1999 Supp. 44-534a(a)(2).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish, dated July 27, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: David J. Bideau, Chanute, KS
Leigh C. Hudson, Fort Scott, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director